Under these circumstances, it appears to me the plain words of the section are against the view put forward on behalf of Tasmania. The whole intention of the Constitution as gathered from the Constitution itself, is in the same direction. I agree with the other members of the Bench that the money in question properly belongs to Victoria, and should remain with her.

GRIFFITH, C.J.—Both questions will be answered in the negative.

Collins did not ask for costs.

Questions answered in the negative. Plaintiff to pay the costs of the Commonwealth.

Solicitor for plaintiff, *Hobkirk*, Crown Solicitor for Tasmania.

Solicitors for defendants, *C. Powers*, Crown Solicitor for Commonwealth; *Guinness*, Crown Solicitor for Victoria.

[HIGH COURT OF AUSTRALIA.]

CLISSOLD AND OTHERS . . . . APPELLANTS;

AND

PERRY (MINISTER FOR PUBLIC INSTRUCTION) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1904.

SYDNEY, *June* 14, 15, 20.

Griffith, C.J., Barton and O'Connor, JJ.

Lands for Public Purposes Acquisition Act, 44 *Vict. No.* 16, *secs.* 12, 13 (*consolidated in Public Works Act*, 1900, *secs.* 95, 96)—*Resumption of land—Valuation of land resumed—Incomplete possessory title—Persons in possession entitled to have a valuation made of their estate or interest—Primâ facie case for compensation—Mandamus.*

Upon the resumption of land by the Minister, as the constructing authority, under the *Lands for Public Purposes Acquisition Act*, 44 Vict. No. 16 (consolidated in the *Public Works Act*, 1900), a person in possession of the land under a possessory title is *primâ facie* entitled to have a valuation made under sec. 13 of his estate or

H. C. OF A. 1904.

CLISSOLD v. PERRY.

interest, upon making a claim as prescribed by sec. 12; and, if the Minister refuses to cause such valuation to be made, he may be compelled to do so by *mandamus*.

In re Paling, 3 (N.S.W.), W.N., 41, so far as it decided that persons having an inchoate possessory title to land were not entitled to have a valuation made under sec. 13, over-ruled.

Decision of the Supreme Court, (1903) 3 S.R. (N.S.W.), 635, reversed.

THIS was an appeal from a decision of the Supreme Court of New South Wales, reported as *Ex parte Clissold*, (1903) 3 S.R. (N.S.W.), 635.

The following statement of the facts is taken from that report:—In 1891 certain land in the possession of Frederick Clissold was, by notification in the *Government Gazette*, under 44 Vict. No. 16 (now consolidated in the *Public Works Act*, 1900, No. 26), resumed for school purposes. Clissold had no documentary title, but had been in possession by his tenants for about 11 years. On his death in 1892 his interest in the land passed under a residuary devise to his trustees, the present appellants. No claim for compensation was made at that time, but in April, 1902, a Judge's order was obtained by the applicants, under sec. 95 of the *Public Works Act*, 1900, extending the time for lodging notice of claim, and on 20th May, 1902, the notice of claim and abstract of title were served upon the Minister, the respondent. The notice and abstract were as follows:—"In pursuance of the *Lands for Public Purposes Acquisition Act* and of the enactments therewith incorporated we hereby give you notice that we claim compensation in respect of the land hereunder described which has been resumed under the said Act. The amount of such claim and other particulars required by the said Act are stated in the subjoined abstract." Then followed the abstract, which set out the names and descriptions of the claimants, and the situation, description, and value of the property, and stated further that at the date of the resumption the land was in the occupation of a certain person as a monthly tenant of Frederick Clissold. The particulars of title contained in the abstract were:—"The claimants are the executors of the said Frederick Clissold, who, at the date of resumption, was in possession of such lands as the owner thereof and in receipt of the rent of such lands, and had a title thereto by possession." Statutory declarations were made in support of the

claim, from which it appeared that Clissold had fenced the land in 1881, prior to which it had been open and vacant, and that he had been in possession from that time till his death. A declaration by one Jamieson stated—"I acted as agent for the late F. Clissold in the purchase of certain lands at Canterbury from Edward Knox in 1881, including all his right, title and interest to the above-named lots; it being then understood that the said Edward Knox had a title by possession for many years."

The constructing authority having refused to make any valuation of the estate or interest of the appellants, as claimants under sec. 96 of the *Public Works Act*, 1900, they applied to the Supreme Court for a Rule Nisi for a *mandamus* to compel him to do so. A Rule was granted on 29th October, 1903, and on 16th November following the Full Court, (consisting of *Stephen*, Acting C.J., *Simpson*, J., and *Pring*, J.), by a majority (*Stephen*, Acting C.J., dissenting), discharged the Rule with costs. [*Ex parte Clissold*, (1903) 3 S.R. (N.S.W.), 635.]

Dr. Cullen, for the appellants. Clissold, as the person in possession of the land at the time of the resumption, had an interest in the land entitling him to have a valuation made under sec. 13 of 44 Vict. No. 16 (sec. 96 of the Act of 1900). The amount assessed should be paid into Court, and Clissold's representatives are entitled to have the income from that money paid to them until the expiration of the period necessary to complete his possessory title, when they will have an absolute right to apply to the Court for payment out of the money deposited, unless in the meantime the real owner of the land, or some person having a better title than the appellants, comes forward and establishes his claim. Although the resumption of the land put an end to Clissold's possession in fact, his rights against the real owner as a person in adverse possession were not disturbed thereby. In *In re Loder*, 19 N.S.W.L.R. (Eq.), 41, *A. H. Simpson*, J., held that the mere resumption of the land cannot stop the *Statute of Limitations* running; that it is an act done *in invitos*, vesting the land in the Minister, but not altering the rights of the parties *inter se*; and that, until the compensation money is paid over, the Minister holds it as trustee for the parties who may ultimately turn out to

H. C. OF A. 1904.

CLISSOLD v. PERRY.

be entitled, the person with the possessory title being entitled to the income in the meantime. The appellants ask merely for a valuation. That will not prejudice the rights of the real owner if he should ever appear, and unless a valuation is made, the appellants will have no foundation for an application to the Court of Equity for payment out when the statutory period has expired. The Minister has merely to make a valuation, but it is for the Court in Equity to determine to whom the compensation money is to be paid. The making of a valuation leaves open the question of who is entitled to the money; *Hart* v. *Minister of Public Works*, (1902) 2 S.R. (N.S.W.), 309. Although by sec. 54 of the Act of 1900 the Minister has a discretion whether he will pay the purchase-money into Court or not, the exercise of his discretion cannot affect the rights of the parties. The object of that section is to enable the Minister, where there is any difficulty as to title, to escape responsibility by leaving the determination of the rights of parties to the Court, but in any case he is bound to make a valuation. The appellants have made out a *primâ facie* case for compensation, within the meaning of sec. 96 of the Act of 1900, because Clissold was in possession at the date of resumption and no one has shown a better title, and the Crown is not entitled to make a presumption against the person in possession. The entry by the Crown was not adverse to Clissold, because it was not a trespass, being made by virtue of powers conferred by a Statute, which is not in any way designed to adversely affect private rights. The Statute is designed to provide for the taking of land for public purposes in such a way as to convert the rights of persons to the possession of land into claims for compensation; sec. 39 (2). The legislation on this subject began with the *Railway Act*, 22 Vict. No. 19, which was founded upon the English *Lands Clauses Consolidation Act* of 1845, under which land was acquired by conveyance, a deed poll being executed by the constructing authority. By the Act 22 Vict. No. 19 no deed poll was required, but sec. 60 vested land resumed for railway purposes in the commissioner. Then followed the Act 44 Vict. No. 16, under which the land in question was resumed, from which it is clear that the duty to make compensation is correlative to the right of resumption. The person in possession at the time of resumption,

where nobody else appears with a better title, must be deemed to be entitled to the fee-simple. He has a devisable and vendible interest, capable of valuation. It is the fee-simple and nothing less until the contrary is shown; *Williams on The Seisin of the Freehold*, pp. 7, 8. He can alienate without incurring the pains of the *Pretenced Titles Act*, which is in force here (see *Salter* v. *Clarke*, 21 (N.S.W.) W.N., 71; *Nicholls* v. *Anglo-Australian Investment Co.*, 11 N.S.W.L.R., 354). The Crown is made the owner by the Act, so that, if the respondent's contention is correct, and the person in possession has no claim to compensation, the Crown acquires the right to compensation—in other words, gets the land for nothing. The whole scheme of the Act presumes a right to compensation to exist in the person in possession unless and until someone shows a better title, and he can ask the Crown to value. If a person in possession without title has no claim to compensation, a person in possession with a defective documentary title is also barred. The Crown is now in the position of a person who had received a conveyance from Clissold of his interest; it could tack on its own possession to Clissold's to defeat a claim to the land by the original owner; *Salter* v. *Clarke* (*supra*); *Willis* v. *Earl Howe*, (1893) 2 Ch., 545; *Dart on Vendor and Purchaser*.

The English cases on the construction of similar sections in the *Lands Clauses Consolidation Act*, 1845, are applicable. On a petition for payment of the income of a fund paid into Court by a railway company on the purchase of land under the Act, *Wood*, V.C., held that the Statute intended that the person in possession should not be disturbed in his enjoyment of land or its equivalent, unless the contrary of his title be clearly made out to the satisfaction of the Court, and that the position of the company was analogous to that of a trustee who has paid the trust fund into Court; *In re Perry's Estate*, 1 Jur. (N.S.), 917. When the occupant of land taken by a railway company under the *Lands Clauses Act* had a possession which would have ripened into a title by adverse possession, but for the dealings with the company, the Court allowed the purchase-money to be paid to such occupant; *In re Evans*, 42 L.J., Ch., 357. The money, when paid into Court, is regarded as the land, and would follow all the devolutions of the land; *In re Stead's Mortgaged Estates*, 2 Ch. D.,

H. C. OF A. 1904.

CLISSOLD v. PERRY.

713, at p. 718. Where the real owner made no claim until after the lapse of 20 years, money paid into Court by a railway company for the purchase of the interest of persons who had been in possession for less than 20 years, was ordered to be paid out to persons claiming under those who had the possessory title; *Ex parte Winder, In re Winder*, 46 L.J., Ch., 572; 6 Ch. D., 696. But, if the real owner does not appear, a mere claim to the land, without possession, gives no right to compensation; *Wells* v. *Chelmsford Local Board of Health*, 15 Ch. D., 108. It is the possession which, in the absence of the real owner, decides the matter. It is immaterial how long the occupant has been in possession, the valuation is to be of the fee-simple; *Gedge* v. *Commissioners of H.M. Works and Public Buildings*, (1891) 2 Ch., 630, at p. 636; and the Court of Equity will not order the payment out to the occupant unless it is satisfied that there are no outstanding claims. *In re Paling*, 3 (N.S.W.) W.N., 41, which is against my contention, was wrongly decided; none of the English cases were there cited; and if *Cholmondeley* v. *Clinton*, 4 Bligh, 1, (particularly the passages on pp. 71, 75, and 97,) had been referred to, the Supreme Court would probably not have decided as they did. *In re Loder*, 19 N.S.W.L.R. (Eq.), 41, decided that the rights of parties *inter se* were not affected by resumption. There is no definition of "owner" in this Act as there is in the English Act, and therefore *Douglas* v. *L. and N.W. Railway*, 3 K. & J., 173; 3 Jur. (N.S.), 181, which decided that a person having a mere possessory title is not an "owner" within the meaning of sec. 76 of the *Lands Clauses Act* 1845, is not in point.

Where a body claims a statutory compulsory power of taking land, it is incumbent upon it to prove clearly and distinctly from the Act that it is acting within the powers conferred by the Statute; and, where there is any doubt, the Act should receive a liberal construction in favour of the land-owner whose rights are affected; *Simpson* v. *South Staffordshire Waterworks Co.*, 34 L.J., Ch., 380; *Lamb* v. *North London Railway*, L.R. 4 Ch., 522; *Tawney* v. *Lynn and Ely Railway Co.*, 16 L.J., Ch., 282.

Sir Julian Salomons, K.C. (*C. B. Stephen* with him) for the respondent. Clissold at the time of resumption had no estate or

interest capable of valuation. He merely had a chance, *i.e.*, the possibility of the real owner not coming forward before the lapse of ten more years. *Williams on Seisin of the Freehold*, at p. 7, qualifies the statement cited for the appellants to this extent, that possession is only *primâ facie* evidence of title in fee simple; it is a mere presumption which may be rebutted. In this case the presumption was rebutted by Clissold's own admission that he was only a trespasser. He had no more real interest then than he had a few days after he first went into possession, although he had a greater chance of acquiring an interest. Upon resumption the title of the owner becomes vested in the Crown, in just the same way as if the owner himself had conveyed the land direct to the Crown. By virtue of ownership the Crown then does what the owner was entitled to do; it turns out the occupant and puts an end to the growth of his interest. If the possession comes to an end before 20 years have elapsed he has nothing, and having no interest or estate known to the law, he has no claim to compensation. The original owner, when found, is the person entitled to compensation, inasmuch as the Crown has deprived him of the right to eject Clissold which he had at the date of resumption. As soon as the Crown has resumed, its ownership draws with it the possession, and that of Clissold ceases. If it were merely a case of defective title, that might be capable of valuation. But where the occupant has admitted that he is a trespasser, he has destroyed his own claim. He was *primâ facie* entitled to the fee-simple, by virtue of possession; and, if nothing further had come to light, there might have been no answer to his claim. But sec. 56 of the Act of 1900 provides that this presumption is only to continue "until the contrary is shown." The Crown case is that the contrary has been shown by the claimant's own admission. The claimant must have some "title" to the "estate or interest" for which he claims compensation, as is clear from sec. 39. It is not enough for him to say that he has been wrongfully enjoying it for a number of years. That gives him no "title" in any sense. It is only the "owners," or the persons who, but for the resumption, would have been the owners, who are entitled to compensation under the Act (see sec. 94). If the argument of the appellants is right, then a man who has been in adverse

H. C. OF A. 1904.

CLISSOLD v. PERRY.

possession of Crown Lands for a period less than 60 years, could, if the land was resumed, claim to have a valuation of his interest, which is manifestly absurd. It is not true to say that the Crown wishes to get the land for nothing. What it says is that Clissold is not entitled, though the real owner may be, because it is not Clissold's estate that has been resumed, but that of the owner. The owner could have turned out the occupant and taken possession of everything built upon the land. Clearly, therefore, the occupant had no rights whatever against the owner, and it is in the owner's shoes the Crown now stands. The notification in the *Gazette* under the Act, has the force of a solemn conveyance by deed; by sec. 37 it not only vests the title in the Crown, but gives the possession as well. The argument that the owner not being in possession could not have conveyed by reason of the *Pretenced Titles Act* has no weight, because that Act does not bind the Crown; and even if it did, the *Public Works Act* overrides it. In the *Public Works Act* the legislature has nowhere recognized such a claim as that now put forward, although it clearly could have done so. Consequently it cannot be assumed that there was any intention to treat such claims as subjects for compensation.

[GRIFFITH, C.J.—Does not the use of the term "interested" in sec. 89 show that at least some "interests" are contemplated in the Act other than those to which you limit the use of the term?]

It may be that a person merely in possession of lands not resumed would, under sec. 89, be entitled to compensation for damage done by the constructing authority in carrying out a work. But sec. 56 refers only to persons *claiming to be entitled* to the land resumed. Clissold has by his own admission that he was a trespasser shown that he did not "claim to be entitled." He has in fact shown the contrary.

[BARTON, J.—The section says "until the contrary is shown to the Court." Does not that mean the Equity Court, after a valuation has been made? The money is to be paid into Court, and sec. 56 assumes that that has been done. But in this case the Crown has not yet paid the money in.]

This is not a case within the meaning of secs. 54, 55 and 56, because the claimant is not the owner or a person having "an

interest therein." The English cases are not applicable here, because there the constructing authorities are commercial companies, formed for the purpose of profit, whereas here the constructing authority is the Crown, acting in the public interest. The rule of construction of our Statutes will therefore be different, and they must be construed in favour of the Crown. Moreover, the terms and provisions of the Acts are very different. The *Lands Clauses Act* contains no section similar to sec. 36 of the *Public Works Act*, putting the company in the shoes of the owner; See *Ex parte Winder*, 6 Ch. D., 696, at p. 700, 703.

[GRIFFITH, C.J.—Is not the only difference in the mode of acquisition of the land?]

The mode is everything. What a private person or company would not be allowed to do may with justice be allowed to the Crown. The English Act has no section corresponding to secs. 37, 39 of the *Public Works Act* 1900, which make the ownership vest in the Crown forthwith upon notification in the *Gazette*. Nor does it contain any section which could have the effect of stopping the *Statute of Limitations* running. Such claims as that of Clissold are recognized by the English Act, and the resumption is merely a compulsory purchase, a matter of contract, which leaves the rights of the parties the same as before, except that the land is converted into money, and the money into land.

In re Paling (*supra*) was rightly decided. The Court there said that the claimant was fortunate in having the enjoyment of the land for so long, as he was, on his own admission, a trespasser. That case was not appealed from, although the amount involved was above the appealable amount, and the decision has stood for 18 years. In *In re Loder* (*supra*) the attention of the Judge was not directed to *In re Paling*. In *Hamilton* v. *Iredale*, (1903) 3 S.R. (N.S.W.), 535, the same mistake was made by the Judge, and his decision was reversed by the Full Court on appeal

The Court will not grant a *mandamus* to work injustice. Here the claimant is seeking to take advantage of the *Statute of Limitations*, in order to get property which belongs to someone else. That Statute was not intended to allow people to take other people's land, but merely to quiet possession. It is not a case in which the Court will assist the claimant.

H. C. OF A. 1904.

CLISSOLD v. PERRY.

Dr. Cullen, in reply. The interest of the appellants is the fee-simple, and they are entitled to have the full value of the land when 20 years have expired; *In re Harris, Ex parte London County Council*, (1901) 1 Ch., 931. The respondent's contention amounts to this, that the resumption is equivalent to an ejectment by the owner. That would be so if the owner were known, and the Crown had taken over his interest. But, the owner not being known, the Crown has only taken Clissold's interest, and must compensate him for it. The resumption of Crown lands is not analogous, because there the title is always in the Crown, and resumption is merely an appropriation of the lands to a specific purpose.

Cur. adv. vult.

20th June.

GRIFFITH, C.J. This is an appeal from a decision of the Supreme Court of New South Wales, by which the Court, by majority (*Stephen*, Acting C.J., dissenting), discharged a Rule Nisi for a *mandamus* to the respondent, the Minister for Public Instruction, the constructing authority under the *Lands for Public Purposes Acquisition Act*, 44 Vict. No. 16 (consolidated in the *Public Works Acts*, 1900), to cause a valuation to be made of a piece of land at Canterbury, which the respondent, as the constructing authority, had resumed in 1891, for the purpose of erecting a public school. The appellants' claim was not put in until the year 1902, the time for so doing having been extended by the Supreme Court, in accordance with powers given under the Statute. The claim was as follows:—[His Honor here read the claim and particulars.] It appears now, and the fact was known to the constructing authority at the date of resumption, that the title set up by Clissold was ten years' possession. There was some evidence that he had bought his right to possession from one Knox, who had been in possession for a number of years, but he himself had only been in possession for ten years, and his case practically rests upon that basis. The contention on behalf of the appellants is that as Clissold, at the time when the land was resumed, had a right to the possession of it against everyone except the real owner, and could have brought an action of ejectment against anyone who could not show a better title than

himself, he ought to be compensated for whatever was taken from him. For the respondent it is contended that the appellants have not shown any title to the land except possession, that Clissold was in possession merely as a trespasser, and that, upon the resumption of the land by the constructing authority, the original owner's legal title became vested in the Crown or constructing authority, and that thereupon Clissold's imperfect title became merged and swallowed up by the legal title, and that, therefore, on the face of the proceedings, it appears that the executors have no interest in the land which can be valued, and no title which will give them a right to compensation. In support of this contention the respondents rely on the case *In re Paling*, 3 (N.S.W.) W.N., 41, in which the Supreme Court of New South Wales held that a person claiming compensation for resumption, on a title consisting merely of 18 years' possession, was not entitled to compensation. We are therefore, in effect, invited to review and over-rule the decision of the Supreme Court in that case, which is not substantially distinguishable from the present.

In considering this matter it is necessary to bear in mind that it is a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest. When this land was resumed, Clissold was in possession, and that possession gave him certain definite rights. In *Cholmondeley* v. *Clinton*, 4 Bligh, 1, Lord *Redesdale*, L.C., speaking of Statutes of Limitation, said (at p. 75) :—" The policy of the law with respect to those Statutes is unquestionably this : possession is always regarded by the law as *primâ facie* title, and it is so regarded with a view to public benefit. It is not with a view to the benefit of the individuals who may be in possession or out of possesssion, who may have title or who may not have title, but it is with a view to public benefit ; because it is the public policy that possession should remain undisturbed. The Statute against pretenced titles is formed on this view, and it is on such ground that a person out of possession is not at liberty to deal with the property in any way whatever, because it tends to disturb the actual possession to the injury of the public at large." Whether we sympathise or not with persons who, to use an Australian

H. C. OF A. 1904.

CLISSOLD v. PERRY.

expression, are called "jumpers," that is the law and the policy of the law. In the case of *Ex parte Winder*, 6 Ch. D., 696, *Hall*, V.C., a Judge of large experience in conveyancing law, dealt with the nature of the interest of such persons as the present appellants, whose land has been taken by a constructing authority. In that case the land had been taken under a contract with the person who was in possession. The learned Vice-Chancellor said (at p. 700): "In this case the party who claims to have the fund paid out had acquired a title by possession of this property for nearly the time which would have operated as a bar to a claim by anybody else. Being in possession, the company negotiate with him for the purpose of taking the land; thus treat him as being in possession, and he assumes himself to be a person who can make a title to the property. A contract is entered into based upon the assumption of his being the owner and capable of making a title to the fee-simple. Nobody can doubt for a moment, that, if this Act of Parliament had not been passed, he had a most valuable right and interest, which could have been sold in the market, although he had not yet the full statutory title." That description exactly fits the position of Clissold, when the land was taken by the Government. The Act referred to by the Vice-Chancellor in the case cited was the *Land Clauses Consolidation Act*, 1845, upon which the New South Wales law on the subject is founded with some variations. Under the English Act of 1845, land may be resumed in either of two ways—by contract, or, if the parties cannot come to terms, then by a notice to treat given by the constructing authority to the other party. If no agreement results, the price is assessed under an elaborate system, sometimes by a jury, sometimes by arbitration. The other party is required to execute a conveyance of his interest. If he cannot make a clear title, the constructing authority executes a deed poll, but before doing so must deposit in Court the amount agreed or assessed. In every case the constructing authority, in order to acquire a title, must pay to the claimant the agreed or assessed sum, or pay it into Court. By the New South Wales Act of 1880, now consolidated in the *Public Works Act* (1900), two methods are prescribed for taking land for public purposes. One is by contract with the owner. By the other method, different

from the English, the Governor-in-Council is authorized to issue a notification, which is to be published in the *Government Gazette* and one or more newspapers, declaring that the land has been appropriated or resumed (see sec. 6). Then sec. 8 provides that upon such notification the land "shall forthwith be vested in the Minister and his successors, &c., for an estate of inheritance, freed and discharged from all trusts obligations estates interests contracts charges rates rights-of-way or other easements whatsoever and to the intent that the legal estate therein together with all powers incident thereto as conferred by this Act shall be vested in the Minister as a trustee, &c." The term "Minister" is defined by sec. 4. Sec. 11 provides that "the estate and interest of every person entitled to land resumed under this Act or any portion thereof and whether to the legal or the equitable estate therein shall by virtue of this Act be deemed to have been as fully and effectually conveyed to the Minister as if the same had been conveyed by the persons legally or equitably entitled thereto by means of the most perfect assurances in the law. And every such estate and interest shall upon the publication of such notification as aforesaid be taken to have been converted into a claim for compensation in pursuance of the provisions hereinafter contained and every person shall upon asserting his claim as hereinafter provided and making out his title in respect of any portion of the said resumed lands be entitled to compensation on account of such resumption in manner hereinafter provided." Sec. 12 provides that, within 90 days after publication of the notification already referred to, the person claiming compensation must make his claim setting out the nature of his estate or interest together with an abstract of his title, &c. The time may be, and in this case was, extended by the Supreme Court. Sec. 13 provides that "within sixty days after the receipt of every such notice of claim by the Crown Solicitor he shall forward the same together with his report thereon to the constructing authority who shall thereupon (unless no *primâ facie* case for compensation is disclosed) cause a valuation of the land or of the estate or interest of the claimant therein to be made in accordance with the provisions of this Act and shall inform the claimant as soon as practicable of the amount of such valuation, &c." The appellants duly sent in a claim, and they now ask for a valuation.

H. C. OF A. 1904.

CLISSOLD v. PERRY.

Bearing in mind that the Statute is to be construed, if possible, so as not to interfere with vested rights, let us consider their position. Clissold was entitled to possession of the land as against anyone except the real owner, and could have asserted that right by an action of ejectment. Indeed, but for the notification, he could have ejected the constructing authority. The Act expressly provides that the title of the holder of the land shall cease upon the notification of the resumption being published in the *Gazette*, and that his estate shall be converted into a claim for compensation. But, if the contention of the respondents were to prevail, that the effect of the notification was to swallow up the ten years' title of the claimant, that would be to give to it the effect of a judgment in ejectment recovered by the real owner —who is unknown to this day—against the person in possession, and the claim to compensation into which the estate is to be converted would be illusory. That would certainly not be a protection of vested interests. To construe the Act in that way would be to make it an Act, not for compensation, but for confiscation. A further examination of the Act will show that, if the effect of resumption were to extinguish imperfect titles, some of its provisions would be quite unnecessary. In the English Act the sections providing for compensation in such cases are introduced by an introductory clause, "and with respect to the purchase-money or compensation coming to parties having limited interests or prevented from treating or not making title . . . be it enacted" &c. (sec. 67). There is no such provision in the New South Wales Statute, but there are various provisions which show that they were intended to apply to persons who failed to make title, like the claimant in this case. After the notification of resumption, the person claiming compensation is not entitled to receive the moneys appropriated for that purpose until he has proved his right to it to the satisfaction of the constructing authority, who, if not satisfied, may pay the amount into Court. It appears, therefore, that the Statute intended to provide that the compensation to be offered should be assessed in the case of persons who could not make a legal title, as well as in the case of those who could. Whatever the nature of the interest which they have, it is assumed to be capable of being valued for com-

pensation. The legislature apparently took it for granted that persons in the position of the claimant here would make claims for compensation, and therefore made provision for their recognition and satisfaction. It cannot make any difference to the rights of the claimant, whether the money is paid into Court or not. His rights cannot be affected by the manner in which the discretion of the constructing authority is exercised. Although the documentary owner, as he has been called, is not known, the Crown is indebted to somebody, and its representative may take advantage of the Act, and avoid further responsibility to the true owner by paying the money into Court. If the money were paid into Court, it is clear from sec. 56 of the Act of 1900 that the present claimants would, under certain conditions, be the persons entitled to receive it. That section provides that "the parties respectively in possession of such lands as being the owners thereof or in receipt of the rents of such lands as being entitled thereto, at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary is shown to the satisfaction of the Court, and unless, upon such inquiry as the Court thinks fit to direct, the contrary is shown as aforesaid, the parties so in possession and all parties claiming under them or consistently with their possession, shall be deemed entitled to the money so deposited and to the dividend or interest of the securities purchased therewith and the same shall be paid and applied accordingly." The contention of the Crown here is that the "contrary is shown," inasmuch as the claimants' title is not complete. But possession is a good title against all the world except the real owner. It is a saleable and devisable interest. "Until the contrary is shown" means until someone else shows a better title in himself. In the meantime, therefore, the contrary not having been shown, it is to be assumed that, if the money had been paid in, the appellants would have been entitled to so much as represents Clissold's interest. The only condition which, under the Statute, will excuse the constructing authority from causing a valuation to be made is that a *primâ facie* case for compensation has not been disclosed. It would be contrary to the principles of construction which have been already referred to, as well as inconsistent with the other provisions of the Act which I have just mentioned, to hold that a

H. C. OF A. 1904.

CLISSOLD v. PERRY.

man who has a possessory title, good against the whole world until the "contrary is shown," has not disclosed a *primâ facie* case for compensation. For these reasons I think that the rule nisi for a *mandamus* directing the respondent to make a valuation should be made absolute. As to *In re Paling*, it may perhaps be distinguishable on the ground that the application for a *mandamus* there was made before the expiration of the twenty years, and the learned Judges there thought, admittedly erroneously, that the granting of a *mandamus* would conclude the inquiry as to title. *Sir James Martin*, C.J., however, gave expression to the opinion that an inchoate possessory title such as that of the present claimants gave no right to compensation. On that point that decision must be taken to be over-ruled.

BARTON, J., and O'CONNOR, J., concurred.

GRIFFITH, C.J.—Our decision does not conclude the principle upon which the assessment will be made, but we hold that the appellants are entitled to compensation for the estate or interest taken from Clissold, whatever that may be ultimately shown to be.

Appeal allowed. Order of the Supreme Court discharging the Rule Nisi for a mandamus discharged. Rule Nisi made absolute with costs. Respondent to pay the costs of the appeal.

Solicitors for appellants, *Carruthers & Wilson.*

Solicitor for respondent, *The Crown Solicitor of New South Wales.*